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No. 78-1545 and 80-951 (Consolidated)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 78-1545

ANNE B. ZIPES, *et al.*, *Petitioners,*

v.

TRANS WORLD AIRLINES, INC., *Respondent,*

No. 80-951

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS, *Petitioner,*

v.

TRANS WORLD AIRLINES, INC., and ANNE B. ZIPES, *et al.*, *Respondents.*

On Writs Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF FOR THE PLAINTIFF CLASS

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As petitioners in No. 78-1545, the plaintiff class offers this response to the Brief of respondent TWA. In part I, we discuss TWA's criticisms of our statement of the case. In part II, we reply to TWA's arguments regarding the proper interpretation of former Section 706(d) and TWA's suggestion that the Court should decide whether TWA waived a timely-filing defense. As to the district court's retroactive seniority order in No. 80-951, TWA agrees with us that the court of appeals correctly affirmed that order and we therefore rest on the arguments presented in our opening Brief (at pp. 36-42).

I.

1. TWA explains that its statement quoted in our Brief at page 4, note 10, was intended to describe only the

allegations in another pending case, not the facts of that case or TWA's employment practice (TWA Brief, at p. 8). We consequently withdraw any suggestion that the quotation constitutes an admission by TWA.

2. Because the plaintiff class had no record of being served with an amended answer and because the court of appeals indicated that there was "no dispute" that the limitations defense had not been raised "in the pleadings" (Pet. App. No. 78-1545, at A15), our Brief (at pp. 8, 35) asserted that TWA had not filed an amended answer after the district court granted it leave to do so in 1974. TWA has directed our attention, however, to a portion of the record showing that it did file an amended answer raising a "statute of limitations" defense in November 1974, four years after the commencement of this suit (TWA Brief, p. 9).[1] Our contrary assertion, which was by no means essential to our position, thus appears incorrect and we respectfully ask the Court to disregard it.

3. TWA claims that our Brief (at p. 4) contains a serious factual misstatement because we wrote that the

[1] TWA's amended answer added verbatim the "Third Affirmative Defense" set forth in its motion for leave to amend, which is reprinted at 1 J.A. 89a. According to TWA's defense, the claims of the plaintiff class were "barred by the statute of limitations under Section 706(e) of Title VII" because charges were not filed with the EEOC "within 180 days after the alleged unlawful employment practices occurred" *(ibid.)*.

Thus, when TWA first raised this objection, TWA itself considered the timely-filing requirement to be a "statute of limitations." Not until December 1975 did TWA assert that failure to comply with the time limit deprived the court of subject matter jurisdiction (1 J.A. 102a-103a).

responsibilities of TWA's male pursers prior to 1970 were substantially the same as those of its female flight attendants (TWA Brief, at p. 8). TWA had argued below that the two positions were materially different, but the court of appeals held that "Male cabin attendants, designated 'pursers' by TWA, could remain on flight duty after becoming a parent. Although pursers served on international flights, their responsibilities were substantially the same as those of female flight cabin attendants" (Pet. App. 78-1545, at A2-A3). Our recital thus corresponds to the lower court's conclusion on a subject about which no issue is presented in the consolidated cases now before the Court.[2]

II.

1. We have argued, as have the United States and the EEOC as *amici curiae*, that the 90-day filing requirement of former Section 706(d) is in the nature of a statute of limitations, subject to equitable modification.[3] In so arguing we relied on the language of the statute, the

[2] TWA also complains about our using the phrase "no-mothers policy" to refer to TWA's pre-1970 practice (TWA Brief, at pp. 7-8). The phrase is descriptive, not pejorative, because it accurately denotes TWA's former policy. In using it, we have merely adopted the parlance of the district court and the court of appeals, which wrote of TWA's "no-motherhood policy" (I J.A. 134a; Pet. App. No. 78-1545, at A4). The phrase "no-pregnancy" policy, which TWA seems to suggest, is misleading because TWA also fired flight attendants who became mothers by adopting children. See the opinion of the court of appeals, Pet. App. No. 78-1545, at A2, A14 n.13.

[3] See our Brief, at pp. 24-34; Brief for the United States and the Equal Employment Opportunity Commission as *Amici Curiae*, at pp. 10-21.

relevant legislative history, the purpose of the provision and the pertinent decisions of this Court.[4] Rather than respond directly to these arguments, TWA suggests what it deems to be a "third alternative" — namely, that the 90-day requirement is neither jurisdictional nor a statute of limitations, but is instead a "condition precedent" (TWA Brief, at pp. 12, 34).

We are far from certain whether TWA's argument is of any consequence in light of the current posture of this litigation. Our analysis is that if the district court, upon entering the retroactive seniority order and the order approving the settlement, properly refused to be persuaded that it lacked jurisdiction because of noncompliance with former Section 706(d)'s time limits, there would be no further question for decision by this Court (see our Brief, at p. 23). As we read TWA's submission, and particularly its reliance on *Glus* v. *Brooklyn Eastern Terminal*, 359 U.S. 231 (1959),[5] failure to comply with this supposed "condition precedent" in Title VII would not deprive a

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[4] We noted (Brief, at pp. 32 n. 68, 40 n. 89) that the dissenting opinion of Justice Powell, joined by the Chief Justice and Justice White, in *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385, 401 (1977), cited an earlier court of appeals' opinion in this case. As TWA points out (TWA Brief, at p. 17 n. 8), this earlier opinion involved proposed settlements with both American Airlines and TWA, although only the former flight attendants of American Airlines were to receive any retroactive seniority beyond that which had accrued prior to their discharge. See *Airline Stewards and Stewardesses Ass'n, Local 550* v. *American Airlines Inc.*, 455 F.2d 101 (7th Cir. 1972); I J.A. 67a. The court of appeals later set aside the district court's orders approving these settlements. See our Brief, at p. 7.

[5] See TWA Brief, at p. 42.

district court of power to hear the case. That indeed was the point of *Glus*.[6]

In any event, there is nothing in the legislative history to support TWA's contention that the 90-day limit should be considered as something other than a statute of limitations. We stressed, as did the Solicitor General, that Congress patterned this timely-filing requirement in Title VII after a comparable provision in the National Labor Relations Act (29 U.S.C. §160(b)), which has uniformly been considered a statute of limitations, not a jurisdictional requirement.[7] While TWA may believe that the "NLRA is not a good analogy" (TWA Brief, at p. 37), Congress thought the opposite and what matters here is Congress' intention.

Furthermore, even if one were to accept TWA's argument that filing a charge with the EEOC is an "essential precondition" or a "prerequisite condition precedent" (TWA Brief, at p. 39),[8] the question remains whether Congress intended *timely* filing with the EEOC to be a

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[6] TWA incorrectly states that the statutory time limit for filing cases under the Federal Employers' Liability Act, which the Court considered in *Glus*, is a "condition precedent" rather than a statute of limitations that must be asserted as an affirmative defense under Rule 8(c) of the Federal Rules of Civil Procedure. TWA Brief, at p. 42. *Burnett* v. *New York Central Railroad Co.*, 380 U.S. 424 (1965), holds in no uncertain terms that the FELA time limit is to be treated as a statute of limitations subject to equitable modification. See also *American Pipe and Construction Co.* v. *Utah*, 414 U.S. 538, 557-560 (1974).

[7] See our Brief, at pp. 26-28; Brief for the United States and the Equal Employment Opportunity Commission as *Amici Curiae*, at pp. 13-18.

[8] The plaintiff class, of course, satisfied this requirement.

jurisdictional imperative, as the court of appeals held.[9] On that score, the legislative record is clear that Congress did not so intend.

2. TWA further contends that if the Court disagrees with the court of appeals' interpretation of former Section 706(d), the Court should then decide whether TWA waived the timely-filing defense by failing to raise it in its answer (TWA Brief, at pp. 44-49). The court of appeals, however, did not decide this question (see Pet. App. No. 78-1545, at A15-A16). The district court also left the question open. While expressing considerable doubt that TWA could justify its four-year delay in pleading the limitations defense, the district court allowed TWA to amend its answer in 1974 and attempt "to prove through discovery techniques or otherwise that the plaintiffs suffered no prejudice or that the delay in amendment was excusable" (I J.A. 101a). Since the lower courts have not passed upon the question, this Court should not consider it. See, *e.g.*, *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 397-398 (1971).

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[9] That TWA's "condition precedent" interpretation is merely an afterthought without any support is further demonstrated by the record. TWA now claims that its original answer placed in issue whether plaintiff class had complied with the time limits of former Section 706(d) because TWA's allegation of insufficient knowledge had the effect of a denial (TWA Brief, at pp. 44-45). But under Rule 9(c), Fed. Rules Civ. Pro., a denial that conditions precedent have occurred must be made "specifically and with particularity" or the defense is lost. See 5 Wright & Miller, *Federal Practice and Procedure* §1304 (1969). TWA's original answer did not satisfy that standard. Of course, when TWA did amend its answer four years later it pleaded the affirmative defense of statute of limitations, not failure to comply with a condition precedent. See note 1 *supra*.

Moreover, at this stage of the litigation any decision about whether TWA waived this defense would constitute a purely advisory opinion. If the Court holds that former Section 706(d) is not jurisdictional, such a ruling would eliminate the basis for the union's arguments against the seniority order[10] and there would be nothing left for decision since in this Court the union does not challenge the separate order approving the settlement.[11]

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[10] See our Brief, at p. 35.

[11] *Id.* at pp. 18-24, 36-38. We disagree with TWA that the Court should reach the issue concerning how former Section 706(d) should be interpreted *only* if the Court first determines that the seniority order cannot otherwise be sustained. TWA Brief, at pp. 25-26, 30 n. *. The issues before the Court in No. 78-1545 and No. 80-951 do not, in our view, necessarily dictate any particular sequence of decision. A result in favor of the plaintiff class, for example, could be based on the alternative grounds that the 90-day requirement is not jurisdictional and that in any event, the question was sufficiently in doubt so that the parties could settle the case, leaving to the district court's discretion after a hearing whether to order retroactive seniority in light of that court's outstanding findings of jurisdiction and violation. See our Brief, at pp. 35-38.

CONCLUSION

For the foregoing reasons and the reasons stated in our opening Brief, the judgment of the court of appeals in No. 78-1545 should be reversed insofar as it rests on the misinterpretation of former Section 706(d) and the judgment in No. 80-951 should be affirmed. In the alternative, if the Court does not deem it appropriate to reach the issue in No. 78-1545, the judgment in No. 80-951 should be affirmed and the judgment in No. 78-1545 should be vacated with instructions to dismiss the appeal as moot in light of the settlement of the case.[12]

Respectfully submitted,

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[12] TWA's pending Petition for a Writ of Certiorari in No. 78-1549 (II J.A. 212) should be denied.